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NO. 87-1517

In the Supreme Court of the United States

OCTOBER TERM, 1987

ST. JOHNS COUNTY, FLORIDA,
Petitioner,

v.

SYLVESTER LUCAS,
Respondent,

and

FRANCIS O'LOUGHLIN, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

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The Petitioner, St. Johns County, Florida, by and through its undersigned attorneys, pursuant to Rule 22.6 of the Rules of the Supreme Court, hereby respectfully submits its Supplemental Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

REASONS THE WRIT SHOULD BE GRANTED

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION RECENTLY HANDED DOWN IN CITY OF ST. LOUIS V. PRAPROTNIK, ___U.S. ___, 108 S. CT. 915 (1988).

While Petitioner St. Johns County's Petition for Writ of Certiorari was being printed, this Court handed down its decision in *City of St. Louis v. Praprotnik*, ___U.S.___, 108 S. Ct. 915 (1988). In its Petition, the County argued that the Eleventh Circuit's decision in this case was in direct conflict with this Court's decisions in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986) and *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978), particularly the fundamental holding in those cases that a local governing body could not be vicariously liable under 42 U.S.C. Section 1983 on a *respondeat superior* theory. The decision below is equally in conflict with *City of St. Louis v. Praprotnik, supra*, which reiterated that "vicarious liability would be incompatible with the causation requirement set out on the face of §1983." ___ U.S. at ___, 108 S. Ct. at 923.

The plurality opinion in *City of St. Louis* set forth several guiding principles for determining when a single act by one individual could establish an unconstitutional municipal policy:

> First, a majority of the Court (in *Pembaur*) agreed that municipalities may be held liable under §1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." 475 U.S., at 480, 106 S. Ct., at 1298. Second, only those municipal officials who have

> "final policymaking authority" may by their actions subject the government to §1983 liability. *Id.*, at 483, 106 S. Ct. at 1300. Third, whether a particular official has "final policymaking authority" is a question of *state law*. *Ibid.* Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business. *Id.*, at 482-483, and n.12, 106 S. Ct., at 1299-1300, and n.12. ____ U.S. at ____, 108 S. Ct. at 924 (emphasis in original).

Applying these guiding principles to the Eleventh Circuit's decision below, it is clear that the decision is not in accord with the principles and should not be allowed to stand. The first principle involves the causation requirement, ie., that a policy of the municipality must have "caused" the constitutional tort. In this case, it is undisputed that the Board of County Commissioners played no part whatsoever in Sylvester Lucas' termination, set no policy which resulted in his termination, did not have the authority to establish a policy affecting the sheriff's employment decisions, and had no power under state law to reverse the sheriff's employment decisions.

The second principle involves the identification of municipal officials with "final policymaking authority." In *City of St. Louis,* the Court found that the "authority to make municipal policy is necessarily the authority to make *final* policy." ____ U.S. at ____, 108 S. Ct. at 926. It was also noted that it is "self-evident that official policies can only be adopted by those legally charged with doing so." ____ U.S. at ____, n.2, 108 S. Ct. at 925, n.2. This Court also recognized a clear distinction between final policymaking authority and the authority to make discretionary decisions. As this Court stated, "[i]f the mere exercise of discretion by an employee could give rise to a constitutional

violation, the result would be indistinguishable from *respondeat superior* liability." ____ U.S. at ____, 108 S. Ct. at 925. In this action, Florida law confers upon the sheriff independence and final authority with respect to personnel decisions in his office, particularly in the selection of his deputies, who are considered his "alter ego." Sections 30.07 and 30.53, Fla. Stat. (1987). However the exercise of discretion by the sheriff in a single employment decision cannot properly be found to be an unconstitutional policy of the Board of County Commissioners, since employment policy in the sheriff's office is not an area that in the County is "legally charged" with adopting. If the sheriff, in the exercise of discretionary employment decisions, is recognized as a final policymaker at all (which is questionable, since the sheriff cannot change state law), he is a policymaker in employment decisions only for the Office of the Sheriff, and not the County.

The third principle of *City of St. Louis* is that the identify of officials with "final policymaking authority" is a question of state law. It was recognized that states "have extremely wide latitude in determining the form that local government takes," and that there could be a "rich variety of ways in which the power of government is distributed among a host of different officials and official bodies." ____ U.S. at ____, 108 S. Ct. at 924. However, the decision of the Eleventh Circuit, in summarily concluding that the act of the sheriff "was the act of St. Johns County," 831 F.2d at 235, totally ignored the Florida Constitution (establishing the sheriff as an independant constitutional officer in Article VIII, Section 1(d)) and Florida's structure of local government as established by the state legislature (particularly in granting the sheriff total independence in employment decisions). Section 30.53, Fla. Stat. (1987). The decision also ignores decisions of the Florida courts, particularly *Murphy v. Mack*, 358 So.2d 822 (Fla. 1978)(recognizing the office of the sheriff as a separate and

distinct political entity); *Fraternal Order of Police Lodge 92 v. Freeman*, 372 So.2d 945 (Fla. App.), *cert denied*, 383 So.2d 1194 (Fla. 1979) (deputy sheriffs are not considered employees of a noncharter county such as St. Johns County); and *Swensen v. Cahoon*, 151 So. 203 (Fla. 1933) (the sheriff alone is responsible for any negligence of his deputies in the discharge of their official duties).

The final principle reiterated in *City of St. Louis* is that the action in question "must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business." ___ U.S. at ___, 108 S. Ct. at 924. As has been stated above, setting employment policy in the sheriff's office was not even an area of the "county's business", since that was an area over which the Board of County Commissioners, under state law, had no jurisdiction and exercised no control.

It is equally clear that the decision of the Eleventh Circuit is in conflict with Justice Brennan's concurring opinion in *City of St. Louis v. Praprotnik, supra.* Ironically, the facts of this case are virtually identical with those of the hypothethical sheriff discussed in footnote 12 of *Pembaur v. Cincinnati* 475 U.S. 469, 106 S. Ct. 1292 (1986), and discussed again the concurring opinion in *City of St. Louis.* The concurring opinion makes it clear that a municipality is not liable under Section 1983 merely because the official has the final authority to act in making a certain decision. To hold the municipality itself liable, the official must also possess the authority to "establish a final policy capable of governing future municipal conduct. . . ." ___ U.S. at ___, 108 S. Ct. at 933. As the concurring opinion concluded:

> At most, then, the record demonstrates that Hamsher [the municipal official in question] had the authority to determine how best to *effectuate*

> a policy announced by his superiors, rather than the power to *establish* that policy. Like the hypothetical Sheriff in *Pembaur's* footnote 12, Hamsher had discretionary authority to transfer CDA employees laterally; that he may have used this authority to punish respondent for the exercise of his First Amendment rights does not, without more, render the city liable for respondent's resulting constitutional injury. ____ U.S. at ____, 108 S. Ct. at 933 (emphasis in original).

Similarily, the sheriff in this case had the discretionary authority under Florida law to effectuate employment decisions within the sheriff's office. That the sheriff exercised his discretion in an unconstitutional manner in discharging Sylvester Lucas does not, without more, render the St. Johns County Board of County Commissioners liable for his single act.

CONCLUSION

WHEREFORE, for the foregoing reasons and for the reasons set forth in its original Petition, Petitioner St. Johns County, Florida respectfully requests that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Supplemental Brief have been served this _____ day of April, 1988 by first class United States mail upon the following:

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